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2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 In the matter of the Complaint of VIP  
7 OUTDOORS, INC., as owner of the 28'  
8 Willie M/V Nemesis, U.S. Coast Guard  
9 Official No. OR849AFE, and her engines,  
equipment, tackle, apparel, appurtenances,  
etc., for Exoneration from or Limitation of  
Liability,

10 Plaintiff,

11 v.

12 MARKEL AMERICAN INSURANCE  
13 COMPANY, as subrogee of Carolyn  
Lubenau, THOMAS LUBENAU,  
CHARLES N. FRELINGER, NATALYA  
IESE,

14 Claimants.  
\_\_\_\_\_

15 MARKEL AMERICAN INSURANCE  
16 COMPANY, as subrogee of Carolyn  
Lubenau,

17 Plaintiff,  
18

19 v.

20 JEFFREY FRENETTE and PREMIER  
21 GUIDE SERVICE, LLC,

22 Defendants.  
\_\_\_\_\_

CASE NO. 21-5132 RJB

Consolidated with 21-5253 RJB

ORDER ON MOTION FOR  
DEFAULT JUDGMENT AND  
MOTION TO SET ASIDE THE  
DEFAULT

1           THIS MATTER comes before the Court on Markel American Insurance Company's  
2 ("Markel") Motion for Default Judgment (Dkt. 24) and Jeffrey Frenette and Premier Guide  
3 Service, LLC's ("Premier Guide") Motion to Set Aside Default Order (Dkt. 30), and Markel's  
4 Motion to Strike (Dkt. 38). The Court has considered the pleadings filed regarding the motions  
5 and the remaining file in both above entitled cases.

6           These consolidated cases arise from the collision of two vessels on the Columbia River  
7 on August 24, 2020. Dkt. 1. The accident occurred between the vessel *Nemesis* and a 2015  
8 Alumaweld vessel. *Id.* Both vessels sank as a result of their collision. *Id.* Jeffrey Frenette is  
9 alleged to have been driving the *Nemesis* while out with clients of Premier Guide. *Id.*

10           On February 22, 2021, a Complaint for Exoneration from or Limitation of Liability was  
11 filed by VIP Outdoors, Inc., as owner of the *Nemesis*. *In the matter of the Complaint of VIP*  
12 *OUTDOORS, INC., as owner of the 28' Willie M/V Nemesis, U.S. Coast Guard Official No.*  
13 *OR849AFE, and her engines, equipment, tackle, apparel, appurtenances, etc., for Exoneration*  
14 *from or Limitation of Liability*, Western District of Washington case number 21-5132 ("VIP").  
15 On February 24, 2021, an Order of Injunction and Monition and Approval of Stipulation for  
16 Value and Costs and Letter of Undertaking was entered. *VIP*, Dkt. 4. That order provided, part,

17           That the continued prosecution of any and all suits, actions or proceedings which  
18 may already have begun against Plaintiff in Limitation in any court whatsoever to  
19 recover damages arising out of, or occasioned by, or consequent upon the  
20 aforesaid voyage or trip on which the incident occurred on or about August 24,  
21 2020, and institution or prosecution of any suits, actions or legal proceedings of  
22 any nature whatsoever in any court wheresoever, except in this proceeding for  
23 exoneration from or limitation of liability, against the Vessel and/or Plaintiff in  
24 Limitation, in respect of any claim or claims arising out of the aforesaid voyage or  
trip on which the Vessel were then engaged, or otherwise subject to limitation  
proceeding, be and the same are hereby stayed and restrained . . .

*VIP*, Dkt. 4, at 3.

1 On April 7, 2021, a complaint was filed against Jeffrey Frenette and Premier Guide in  
2 *Markel American Insurance v. Jeffrey Frenette and Premier Guide Service, LLC*, Western  
3 District of Washington case number 21-5253 (“*Insurance Subrogation Action*”), Dkt. 1. Markel,  
4 the plaintiff, is alleged to have provided the insurance policy for the 2015 Alumaweld vessel  
5 involved in the collision. *Id.* Markel alleges that it has made paid policy benefits as a result of  
6 the collision. *Id.*

7 On April 13, 2021, Frenette and Premier Guide’s lawyer contacted Markel’s lawyer to  
8 advise him of receipt of the Complaint. *Insurance Subrogation Action*, Dkt. 31. On April 14,  
9 2021, Frenette tendered defense of the lawsuit to his insurance companies. *Id.* That same day,  
10 the Court issued an order to show cause in both cases why *VIP* and the *Insurance Subrogation*  
11 *Action* should not be consolidated. *Insurance Subrogation Action*, Dkt. 8. Frenette and Premier  
12 Guide’s lawyer contacted Markel’s lawyer and let him know that he could “represent to the court  
13 [Frenette and Premier Guide’s] agreement to consolidate.” *Id.*, Dkt. 31.

14 On April 22, 2021, Markel responded to the order to show cause, agreeing the cases  
15 should be consolidated. *Insurance Subrogation Action*, Dkt. 9. Rather than being candid with  
16 the Court, it did not mention that Frenette and Premier Guide had also agreed that consolidation  
17 was appropriate. *Id.* (Responses to the order to show cause were originally due on April 23,  
18 2021; the deadline was reset to May 14, 2021, in part because the time for Frenette and Premier  
19 Guide to respond to the complaint had not lapsed. *Insurance Subrogation Action*, Dkts. 8 and  
20 12.)

21 Frenette and Premier Guide’s lawyer explains what happened at that point:

22 When the Exoneration was reviewed, our office read Dkt. 4 [in *VIP*] as enjoining  
23 and staying any related suits, actions or proceedings, including the institution or  
24 prosecution of those suits. This included the [*Insurance Subrogation Action*]. The  
Court asked for cause as to why the two matters should not be consolidated, and  
we agreed, having already advised counsel of the agreement. Our office was

1 waiting on both indemnification from the insurance carriers as well as the  
2 consolidation to file an Answer for Defendants.

3 Our office had tentatively docketed an Answer date of May 3, 2021. That  
4 calendar entry was mistaken as a deadline to file a claim in the Exoneration, for  
5 which Mr. Frenette is not making a claim, as the original matter was believed to  
6 be on hold. As the matters were not yet consolidated, an Answer was not filed for  
7 Defendants.

8 *Insurance Subrogation Action*, Dkt. 31.

9 On May 5, 2021, Markel filed a motion for default against Frenette and Premier Guide.  
10 *Insurance Subrogation Action*, Dkt. 13. On May 17, 2021, the clerk entered default against  
11 Defendants Jeffrey Frenette and Premier Guide. *Insurance Subrogation Action*, Dkt. 14.

12 On May 17, 2021, the *Insurance Subrogation Action* was consolidated with *VIP*. *VIP*,  
13 Dkt. 23. Future filings for both cases were ordered to be in *VIP*. *Id*.

14 On May 19, 2021, Markel filed the instant motion for default judgment against Frenette  
15 and Premier Guide. *VIP*, Dkt. 24. The evening of May 19, 2021, Frenette and Premier Guide  
16 filed an Answer and Affirmative Defenses. *VIP*, Dkt. 27. On June 2, 2021, Frenette and Premier  
17 Guide filed the motion to set aside default order. *VIP*, Dkt. 30. Markel responded (*VIP*, Dkt.  
18 33), Frenette and Premier Guide filed a reply (*VIP*, Dkt. 37) and Markel filed a surreply and  
19 motion to strike (*VIP*, Dkt. 38).

20 **Markel's Motion to Strike (*VIP*, Dkt. 38).** Markel moves to strike Frenette and Premier  
21 Guide's reply (*VIP*, Dkt. 37) arguing that it contains new arguments which were not raised in  
22 their opening brief. *VIP*, Dkt. 38. Markel's motion to strike Frenette and Premier Guide's reply  
23 (*VIP*, Dkt. 38) should be denied, in part and granted, in part. Contrary to Markel's assertions, the  
24 reply did not contain entirely new argument. To the extent that it contained new grounds to set  
aside the default, it was not considered.

1           **Frenette and Premier Guide’s Motion to Set Aside Default Order (VIP, Dkt. 30).**

2 Pursuant to Fed R. Civ. P. 55(c), the “court may set aside an entry of default for good cause.”  
3 “To determine good cause, a court must consider three factors: (1) whether the party seeking to  
4 set aside the default engaged in culpable conduct that led to the default; (2) whether it had no  
5 meritorious defense; or (3) whether reopening the default judgment would prejudice the other  
6 party.” *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091  
7 (9th Cir. 2010)(*internal quotation marks and citations omitted*). “[J]udgment by default is a  
8 drastic step appropriate only in extreme circumstances; a case should, whenever possible, be  
9 decided on the merits.” *Id.*

10           Frenette and Premier Guide’s Motion to Set Aside Default Order (VIP, Dkt. 30) should  
11 be granted. Frenette and Premier Guide sufficiently showed that they did not engage in  
12 “culpable conduct that led to the default.” Further, they raise defenses in their Answer, including  
13 “fault of others,” “failure to mitigate,” defenses related to policy coverage and failure to state a  
14 claim. *Insurance Subrogation Action*, at 16. At this stage in the litigation, it cannot be said that  
15 Frenette and Premier Guide have “no meritorious defense.” Moreover, reopening the default  
16 order would not prejudice Markel. This litigation has just begun. Markel’s lawyer was aware  
17 that Frenette and Premier Guide were actively working on the case. Markel’s lawyer’s decision  
18 to continue with the motion for default judgment resulted in nothing more than additional  
19 expense for the parties and a drain on judicial resources. This case does not represent an  
20 “extreme circumstance” where judgment by default is appropriate. This case should be decided  
21 on the merits. The May 17, 2021 order entitled, “Default Entry,” (*Insurance Subrogation Action*,  
22 at 14) should be set aside.

23           **Markel’s Motion for Default Judgment (VIP, Dkt. 24).** Markel’s Motion for Default  
24 Judgment (VIP, Dkt. 24) should be denied. By this order, default has been set aside.

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- The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Robert Bryan

ORDER ON MOTION FOR DEFAULT JUDGMENT AND MOTION TO SET ASIDE THE DEFAULT - 6